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In The

Supreme Court of the United States

October Term, 1980

No.

RUTH D. HINSON,

Petitioner,

vs.

STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The petitioner Ruth D. Hinson prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of New Jersey rendered in these proceedings on May 13, 1980, which affirmed the decision of the Superior Court of New Jersey, Appellate Division, dated December 20, 1979.

QUESTIONS PRESENTED

The petitioner was charged with submitting false and fraudulent cost study reports concerning operation of two nursing homes in which she was a partner, which thereby resulted in her receiving Medicaid payments in a larger amount than which she was entitled.

The questions arising therefrom are:

1. Was petitioner entitled to present evidence that she relied upon her accountants to use their expertise in preparing proper and correct cost study reports? Did exclusion of such evidence deprive petitioner of due process and the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution?

2. Was petitioner entitled to present expert testimony concerning the ability of accountants to prepare proper and correct cost study reports from her original records and books of entry? Did exclusion of such evidence deprive petitioner of due process and the right to a fair trial and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution?

3. Did the trial court judge adequately and properly investigate an allegation of juror bias against petitioner? Was the jury verdict thereby so tainted as to violate petitioner's Sixth and Fourteenth Amendment rights?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey, as yet unreported, is annexed hereto at Appendix A, *infra*. The opinion of the Superior Court of New Jersey, Appellate Division unreported, is annexed hereto at Appendix B, *infra*. The judgment of the Superior Court of New Jersey, Law Division, unreported, is annexed hereto as Appendix C, *infra*.

JURISDICTION

The judgment of the Supreme Court of New Jersey, entered on May 13, 1980, in which certification is denied, thereby affirming the opinion of the Superior Court of New Jersey, Appellate Division, dated December 20, 1979, is final by its terms. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance Counsel for his defense."

United States Constitution, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Jersey Constitution, Article I:

"Section 10. In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

STATEMENT OF THE CASE

The petitioner Ruth D. Hinson was formerly a partner in two nursing homes, Mountainview Nursing Home and Brookbend Convalescent Home, both located in Wayne, New Jersey. Petitioner also served as the licensed administrator for both homes. The majority of the patients in both homes were recipients of Medicaid benefits. The amount of benefits payable for these patients was determined based upon cost study reports submitted by the petitioner to the Division of Medical Assistance and Health Services of the State of New Jersey.

On October 7, 1976, petitioner was charged under indictment number 889-76, Superior Court of New Jersey, Law Division, with nineteen counts of fraud pertaining to the cost study reports submitted by her for the years 1971-1975, and that she thereby received greater sums of money than to which she was entitled.

Basically, the State alleged that the cost study reports contained many personal expenses, thereby causing petitioner to be paid at an inflated Medicaid reimbursement rate. Trial was begun in the Superior Court of New Jersey before the Honorable Joseph Donatelli, J.S.C., and a jury of twelve on October 11, 1977. Petitioner did not dispute that the cost study reports, as submitted, included various personal expenses for which she was not due reimbursement. These expenses included payment of taxes on real estate not used for the business, payment of personal expenses for a nephew of the partner of petitioner, payment of personal expenses such as boarding charges for petitioner's pet, purchase of U.S. Savings Bonds, and payments to a former partner.

The basic defense which petitioner attempted to present at trial was that the above items were included in the cost study reports because of the improper actions of her accountants. Petitioner entrusted her accountants with her original books of record and expected said accountants to collate therefrom the information that was to be properly included in the Medicaid cost study reports. The accountants did not properly perform this function. Petitioner offered further expert testimony that she, as a lay person, would be unable to determine, by reviewing the completed cost study reports, that said improper expenses were included therein, and that her accountants owed an obligation to her to explain any deficiencies in her records. The thrust of this defense was that defendant did not willfully or intentionally defraud the State of New Jersey because she was unaware that the cost study reports included these personal expenditures.

The trial court ruled that the aforesaid evidence was not admissible. The court ruled as a matter of law and fact that defendant could not avoid criminal culpability under the defense of reliance upon hired professional experts, such as accountants. Thus, the court precluded petitioner from presenting expert testimony as to her right to rely upon the expertise of the

accountants in their preparation of the cost study reports. Thus, the defense was prevented from submitting the following factual issues to the jury:

A. Was there supporting documentation available to the accountants hired by petitioner by which they should have excluded the non-allowable personal expenditures from the cost study reports?

B. Did the petitioner have a proper understanding of correct accounting procedures?

C. Did the petitioner rely upon the expertise of her accountants to properly prepare accurate Medicaid cost study reports?

Midway through the trial, on October 20, 1977, a juror came foreward and notified the trial judge that some unknown individual had questioned his neighbor concerning whether he, the juror, was participating in the trial of the nursing home owner. Immediately prior thereto, counsel for petitioner had advised the trial court that a juror had made derogatory remarks to an employee of petitioner's nursing home directed against defense counsel. Petitioner's counsel requested a voir dire to determine whether any juror was biased or predisposed to prejudge the case. The trial judge refused to conduct a voir dire, although he did engage in a minimal examination of the juror in chambers without counsel present. Thereafter, prior to submitting the case to the jury for deliberation, the trial court dismissed the juror in question.

On October 27, 1977, petitioner was adjudged guilty on all counts of the indictment. Sentence was imposed on November 29, 1977, as follows: three to five years incarceration, and fines totaling $6,000.

FEDERAL QUESTIONS RAISED

The federal question raised herein, whether petitioner was denied a fair trial, was first raised in the trial court when defense counsel asserted that the evidentiary ruling of the court was removing a factual issue from the jury. The following quotations from the trial transcripts indicate the method and manner by which the question was raised, and the decision by the trial court:

> "Mr. Cherry: Of course, you are making a judgment on a fact. And the question of whether full disclosure was made is a fact for the jury to determine.
>
> The Court: Well, is there going to be testimony — are you saying now, because if you can convince the Court later on it might change my mind, that there was some explanation given to the accountants about the cash?
>
> Mr. Cherry: Yes. I think I can explain that away.
>
> The Court: Well, presently I have made my ruling. I am satisfied that the defense of lack of information from the auditor to the individual wherein they failed to explain to her that certain items should not have been in there will not go before this jury." (10/25/77 T141-23 to T142-14).
>
> "Mr. Cherry: It is a matter of fact for the jury to decide, the willfullness of my client or not in doing something that she has alleged to have done improperly. It also might aid the jury in ultimately deciding who was responsible for including the taxes, the improper taxes in the cost study report.

The Court: Did she sign the report? Did she sign it?

Mr. Cherry: She signed the report.

The Court: All right. And that is what we are talking about. We are not going to escape liability in this case by placing it upon somebody else, Mr. Cherry. You understand what I am saying? If the accountants did something wrong that is something else. There is a certain responsibility when somebody completes a form and signs it. There is a certain responsibility." (10/25/77 T164-9 to 25).

"Mr. Cherry: The question there is if you hide something from your accountant or supplied him with all the records. That is the issue. If this woman had supplied everything and the accountant prepared the reports without full knowledge, then I would say no, you can't use that defense. But —

The Court: You mean if a person that uses certain funds, for example, for a building in Middletown, New Jersey, and Boise, Idaho, that the accountant has to tell her she should not do that?

Mr. Cherry: I am saying if an accountant has to look at the books and he sees there is an expense paid to something that does not belong, it is his responsibility.

The Court: And it relieves her of the responsibility?

Mr. Cherry: Not the criminal liability of New Jersey, not the liability of New Jersey. I am talking about the criminal liability — a criminal responsibility, yes; essentially, if she has relied on that accountant to do a certain function.

The Court: I do not agree with that at all. You can submit whatever questions you want tomorrow and I will look them over as to what you would actually ask Mr. Becht.

Mr. Cherry: Okay. I submitted a brief to the Court.

The Court: I read it.

Mr. Cherry: And Mr. Carley told me we would have a reply by Monday. I have not seen his reply either.

The Court: That may be. But I have to determine whether or not that issue should go before the jury. And I am not letting it go before the jury. I am not letting go before the jury where this jury has to decide whether Miss Hinson did do or did not do a particular act because the accountant failed to tell her that she should not have done it." (10/24/77 T221-7 to 25, T222B-1 to 24).

This issue was further raised in Point I of the brief filed by petitioner on appeal of the trial conviction to the Superior Court of New Jersey, Appellate Division, and further on petition for certification to the Supreme Court of New Jersey.

The issue involving juror bias was raised at trial on October 20, 1977:

> "Mr. Cherry: Because we were—I have got a report from one of the aides in the nursing home that she got a statement from either this Juror or maybe his wife or whatever. I am not sure now. But I found that out. I brought it to the Court's attention.
>
> I think it is a problem that has to be resolved, O.K. I think where a Juror has made some sort of a statement which apparently reflects upon defense counsel or on the case itself, I think it is incumbent, if that is substantiated even in the slightest way, it is incumbent upon the Court to remove him." (10/20/77 T21-8 to 21).

The court ruled against dismissing the juror:

> "The Court: Well, I am going to let him stay on. If anything else develops, we will handle it accordingly. Based on the information I have so far, what information I have so far, I am going to allow him to remain. If something develops, then we will handle it accordingly." (10/20/77 T33-1 to 6).

This issue was raised on appeal to the Superior Court of New Jersey, Appellate Division, as Point II, and again on petition for certification to the Supreme Court of New Jersey.

REASONS FOR GRANTING THE WRIT

I.

The exclusion of evidence at trial denied petitioner a fair and impartial trial with effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution, and further denied her due process as guaranteed by the Fourteenth Amendment.

In our modern society, specialization of the various aspects of commerce has become increasingly widespread. With increasing governmental regulation of certain industries, reliance upon professionals, such as accountants, has become an essential part of daily business operation. The question which the present case posed was: Can a good faith reliance upon an accountant to prepare proper and correct reports excuse the petitioner from criminal liability where the improper actions of the accountant result in her receiving greater governmental benefits than to which she was entitled? Petitioner herein contends that the accountants she hired to prepare Medicaid cost study reports were responsible to delete non-allowable expenditures from the reports which they prepared from the original records and books of entry maintained by the petitioner. This presented a factual issue to be determined by the jury. However, the trial judge excluded testimony from several sources which had a direct bearing on this issue.

The court ruled that the defense could not produce expert testimony as to the responsibility of petitioner's accountants to prepare the cost study reports. As a result, petitioner was unable to present evidence which demonstrated a lack of willfulness or intent on her part.

In the case *sub judice,* whether the petitioner relied upon independent, reputable accountants to properly prepare her reports and returns, is an issue to be left to the jury to decide. In

order to properly perform their duty, the jury must hear evidence as to the proper and reasonable performance of her accountants.

N.J.S.A. 30:4D-17, in pertinent part says:

> ". . . (a) It shall be unlawful for any person to willfully obtain benefits under this act to which he is not entitled, . . ."

State v. Gleitsmann, 62 N.J. Super. at 20, holds:

> ". . . Willfullness, a term which may have different meanings in different contexts, means in the context of malfeasance arising out of the breach of a duty of public concern 'an evil purpose or mental culpability', a concept which is often labelled 'criminal intent,' 'guilty knowledge,' 'mens rea', 'bad purpose' or corruption."

See also, State v. Burden, 126 N.J. Super. at 426; *Good v. Good,* 135 N.J. Super. at 60; and *State v. Williamson,* 54 N.J. Super. 183-4.

In the modern business world, persons conducting monetary transactions have come to rely more and more upon those skilled in accounting practice to aid in the ordinary course of commerce. This is especially so where the "client" is one who has not been trained in accounting and is required to submit complex forms to governmental agencies. Whether such a person relies upon an independent accountant to advise her and to prepare those reports, is a fact question for the jury, and evidence should have been allowed on that issue. It then becomes a question of law for the judge to determine whether or not such reliance relieves the person of criminal responsibility. The professional responsibility of an accountant is relevant to what a client may reasonably rely upon; accordingly, it was relevant here to the issue of petitioner's willfullness.

For the trial court to have decided that such facts were to be kept from the jury, was, in effect, saying that from what appears in the records produced by the State there can be no explanation or defense; that the petitioner was subject to a standard of strict liability which resulted in her conviction. As a result, petitioner-appellant was denied her right to a fair trial.

And, following a request by counsel, the court charged:

> "The Court: Member of the jury, there is one matter that I overlooked in my charge and I wanted to indicate it to you. It refers to the word 'willfully.'
>
> An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids. I, of course, have already defined intent for you and so you will consider that in the charge together with everything else. But I just wanted to bring that to your attention. This is all." (10/27/77 T86-17 to T87-4).

Thus the court, by its own ruling, demonstrated the error in excluding evidence of a defense of reliance on petitioner's accountants. The result was a denial of petitioner's right to a fair trial and denial of due process of law. As a result, a reversal of her conviction is required to remedy her denial of a just and fair trial.

II.

The decision below is in conflict with other federal courts of appeals.

These evidentiary rulings are in conflict with prevailing decisions of other federal courts. In *United States v. Platt*, 435 F. 2d 789 (2d Cir. 1970), the court ruled that proof of reliance

on an accountant was properly admissible evidence in a prosecution for willful failure to file income tax returns.

In *United States v. O'Connor,* 237 F. 2d 466 (2d Cir. 1956), it was held that a criminal defendant should be allowed to prove any theory of defense for which there is a foundation, however weak that defense may be.

The rulings of the trial judge in the matter *sub judice* denied to this petitioner the right to present a defense that is available to others pursuant to the rulings of federal courts of appeals. This denial of rights guaranteed to others denied petitioner due process of law to which she is entitled under the Fourteenth Amendment of the United States Constitution.

In connection with this wide latitude, federal courts have consistently held that it is for a jury to determine what weight to give to the testimony of an expert witness called by the defense. *United States v. Galvin,* 394 F. 2d 228 (3rd Cir. 1968); *United States v. Sullivan,* 555 F. 2d 226 (C.A. Ariz. 1977). Thus, a mistake by an expert affects only his credibility and not the admissibility of his testimony. *United States v. Gargiulo,* 554 F. 2d 59, 64 (2d Cir. 1977).

In the present matter, petitioner was denied the right to present this evidence to the jury. An order should be entered reversing her conviction and remanding this matter for a new trial at which time such testimony can be presented on her behalf.

III.

Faced with the strong possibility of juror bias, the trial court failed to adequately investigate this issue, thereby denying petitioner the right to a trial by a fair and impartial jury pursuant to the Sixth Amendment of the United States Constitution.

During trial, it became known to defense counsel that a certain juror was acquainted with an employee of the petitioner, and that said employees were actively discussing petitioner's trial (10/19/77 T65-23, *et seq.*). Defense counsel was concerned because of existing labor problems which would prejudice petitioner in the eyes of her employees (10/19/77 T66-1).

The trial judge thereupon questioned said juror *in camera.* During this conversation, the juror in question expressed concern that his withdrawal would adversely affect the petitioner's eventual conviction. These comments certainly indicate either that the juror had already formulated an opinion as to the petitioner's guilt or that he was, in fact, demonstrating bias against her (10/20/77 T9-2 to 14). The juror also expressed concern that his integrity was being questioned (10/10/77 T10-24 to T11-9). It is to be noted that counsel had informed the court that an investigation revealed that the juror had made derogatory remarks about defense counsel (10/10/77 T14-9 to 14, T35-1 to 5). The court refused to conduct any further investigation into the matter and allowed the trial to proceed, denying a formal motion to dismiss the juror which was made by defense counsel (10/10/77, *in camera,* T7-9). However, following completion of testimony, the court then reversed its position and excused the juror in question before deliberations began. At this point, there was no way to determine whether this juror was prejudiced against petitioner, and if so, whether he had tainted the other jurors.

Where a trial court is advised of the *possibility* of prejudice or bias on the part of a juror, a full and appropriate inquiry

should be made. *State v. Marchitto,* 132 N.J. Super. 511, 516, *cert. denied,* 68 N.J. 163 (App. Div. 1975). In the alternative, if the court does not deem it advisable to interrogate the juror, he should be immediately excused from further participation in the case. *Marchitto, supra* at 517. The failure of the trial judge to take either alternative course of action left the matter in the state in which the issue cannot be properly resolved. *See also, State v. Brewer,* 142 N.J. Super. 70, 75 (App. Div. 1975).

The failure of the trial court to properly investigate and resolve the problem with the aforesaid juror, requires this Court to reverse the conviction since there is no opportunity to determine whether this jury was tainted and biased against petitioner. To do otherwise denies her a fair trial and due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, as affirmed by the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A — ORDER OF SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-642 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RUTH D. HINSON,

Defendant-Petitioner.

FILED MAY 14, 1980
Stephen W. Townsend
Clerk

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1230-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 13th day of May, 1980.

s/ Stephen W. Townsend
Clerk

dp

APPENDIX B — OPINION OF THE SUPERIOR COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1230-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RUTH D. HINSON,

Defendant-Appellant.

Argued November 27, 1979 — Decided

Before Judges Matthews, Ard and Polow.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County.

Robert B. Cherry argued the cause for appellant (Cherry, Petrie & Vallario, attorneys).

Simon Louis Rosenbach, Deputy Attorney General, argued the cause for respondent (John J. Degnan, Attorney General, attorney).

BY THE COURT

Defendant was indicted and charged with 19 counts of Medicaid fraud pertaining to cost study reports submitted for the years 1971 through 1975. All counts charged a violation of *N.J.S.A.* 30:4D-17 and *N.J.S.A.* 2A:85-14. Additionally, counts 1, 3, 5, 7, 9, 11, 12, 14, 16 and 18 charged violations of *N.J.S.A.*

2A:85-5. More specifically, counts 1, 3, 5, 7, 9 and 11 alleged that defendant attempted to, and did, receive excess Medicaid payments for filing false Medicaid cost studies for the Mountain View Nursing Home during the years aforesaid. Counts 2, 4, 6, 8 and 10 charged that defendant fraudulently prepared Medicaid cost studies for the Mountain View Nursing Home during the same years with the intent to defraud the State of New Jersey. Counts 12, 14, 16 and 18 alleged that defendant attempted to, and did receive excess Medicaid payments by filing false Medicaid cost studies for the Brookbend Convalescent Home during the same years. Counts 13, 15, 17 and 19 charged that defendant fraudulently prepared Medicaid cost studies for the Brookbend Convalescent Home during the same years with intent to defraud the State of New Jersey.

Thereafter, defendant sought entry into the county's Pretrial intervention Program. She was rejected, and after obtaining judicial review of the objection, was again rejected. Leave to appeal was denied. She was then tried by a jury which returned a verdict of guilty on all counts.

She was sentenced as follows. On each of counts 3, 7, 9, 11, 16, 17, 18 and 19 defendant was fined $1,000. Sentence was suspended on counts 17 and 19. Additionally, she received a two to three year term to the New Jersey Correctional Institution for Women, at Clinton, on count 5 and a consecutive one to two year term to the same institution on count 14.

On appeal she asserts:

POINT I Defendant was denied a fair trial by the ruling of the trial court preventing evidence of a defense, that defendant relied on accountants to prepare the Medicaid cost study reports, and that defendant did not thereby willfully violate *N.J.S.A.* 30:4D-17 *et seq.*

Appendix B

POINT II — The court committed reversible error by failing to investigate the possibility of juror bias, or alternatively, immediately discharging said juror from the panel.

POINT III — The sentence imposed upon the defendant-appellant was harsh and excessive and requires modification and reduction

POINT IV — Defendant was wrongfully denied admittance to the pretrial intervention program. (A) The crime with which defendant has been charged is not a breach of the public trust. (B) The mere fact that defendant was charged with a crime that may be a breach of the public trust, should not automatically preclude her acceptance into pretrial intervention.

POINT V — Allegations of criminal offenses prior to the effective date of *N.J.A.C.* 10:63-3.1 *et seq.* should have been dismissed as being void for vagueness.

The defendant was the owner of two nursing homes, the Mountainview Nursing Home (Mountainview) and the Brookbend Convalescent Home (Brookbend). In 1971 both nursing homes became Medicaid providers. The Medicaid program is part of Title XIX of the Social Security Act which became effective in this State on January 1, 1970. The funds are provided by the federal and State governments. The program is administered by the Division of Medical Assistance and Health Services. Funds dispersed by the program are used to pay physicians, dentists, pharmacists, hospitals and nursing homes who provide specific types of medical treatment for eligible patients. In order to receive payments, the nursing home has to be properly licensed by the State Department of Health. Then, it must be certified by the Division as a "provider." To be so

certified, the nursing home must sign a contract which provides, among other things, for the filing of an annual cost study. Either the owner of the nursing home or an officer of a corporation owning the nursing home must sign the cost study certifying the accuracy of the data contained therein. A cost study is an essential factor in determining the per diem rate at which the provider is reimbursed for the medical services it provides.

From 1971 through 1975 Mountain View and Brookbend submitted the required annual cost studies. The 1971, 1972 and 1973 cost studies from both homes were signed by defendant as owner of the institutions and preparer of the cost studies. The 1974 and 1975 cost studies from both institutions were signed by defendant as owner. The accounting firm signed as preparer for these two years. All of the cost studies were certified as correct by defendant.

Essentially the gravamen of the State's case was that defendant either attempted, aided and abetted or did misrepresent vital facts in the cost studies to effectuate a fraud.

During the trial the defendant did not dispute the facts pertaining to the personal expenses included in the cost studies, but insisted that she did not willfully or intentionally defraud the State because she was unaware that the cost studies included the various personal expenses when they were submitted. She claimed that she entrusted her accountants with the original books of record and expected them to properly prepare the cost studies. Her contention was that the accountants were responsible to delete non-allowable items from the reports during their examination of the daily records and ledgers. In support of this contention she proffered expert testimony as to the general responsibility of an accountant in preparing cost study reports. The court ruled that such testimony was inadmissible in that it was not relevant to the defendant's guilt.

Appendix B

We agree with the trial court. The defendant's participation in the preparation of the studies, the fact she signed the studies as preparer and owner and supplied summary sheets from which her accountants worked all support defendant's culpability. The two accountants who worked on the defendant's cost studies testified that they worked solely from the cash disbursements journals provided by the defendant. The State's proofs were uncontroverted that the defendant consistently included personal items in her books of original entry for the nursing homes. Unquestionably the jury was presented with sufficient evidence to conclude that defendant by her own willful actions endeavored to obtain funds to which she was not entitled. The record does not reveal that the defendant was improperly precluded from attempting to support her claim that she did not willfully obtain benefits to which she was not entitled. *N.J.S.A.* 30:4D-17(a). The general responsibility of the accountant in preparing the cost reports is not relevant to her personal acts of culpability and therefore the trial ruling was correct.

Defendant's argument that the court committed reversible error with respect to possible juror bias is also without merit. The juror in question was investigated by the court and found to be unbiased. Moreover, the juror was excused before deliberations, and there is simply no basis in this record to conclude that the verdicts were the product of a tainted jury. Unquestionably a trial judge has a duty to investigate allegations of juror impropriety. *State v. Levitt,* 36 *N.J.* 266 (1961). However, the trial court need not dismiss a juror if, after investigation, the court is satisfied that the comments or incidents complained of do not prejudice the defendant's right to a fair trial. *State v. Marchitto,* 132 *N.J. Super.* 511, 516 (App. Div. 1975), certif. den. 68 *N.J.* 163 (1975). The defendant has not produced any evidence that the verdicts in this case were the product of a tainted jury, and in the absence of such proof, especially in view of the fact that the suspected juror did not participate in the deliberations, the convictions should be presumed valid. *Cf. State v. Brown,* 46 *N.J.* 96, 108 (1965).

Appendix B

The defendant alleges she was wrongfully denied admittance to the pretrial intervention program arguing that the crime of Medicaid fraud is not a breach of the public trust. We again disagree. In denying defendant's application the program director took the position that defendant's crimes were a breach of the public trust and precluded under *PTI Guideline* 3(i)(4). The record reveals that over a five year period the defendant defrauded the State and federal government of thousands of dollars. The Medicaid program is administered by the State and involves public monies. Not only do the frauds add to the public tax burden, but also tend to impugn the program in the public's eye. We find no basis to narrowly define "public trust" as synonymous with public office. Moreover, *State v. Sutton*, 80 *N.J.* 110 (1979) held that a prolonged welfare fraud fell within PTI Guideline 3(i)(2) "and thus 'generally' to result in rejection from PTI." 80 *N.J.* at 118. Defendant's disqualification is certainly justified under this latter guideline. Unquestionably the jury verdicts support the conclusion that defendant was engaged in a series of frauds analogous to welfare frauds found in *Sutton*. We find no basis to conclude that the action of the program director or the trial court was unreasonable or arbitrary in denying defendant's admission into the program.

Defendant next argues that since the regulations codifying the procedures for completing a cost study (*N.J.A.C.* 10:63-3.1 *et seq.*) were not promulgated until February 19, 1974, she cannot be held accountable for the fraudulent cost study reports submitted prior to that date. We consider the argument specious. Although the cost study procedures had not been codified until the aforesaid date, defendant received instructions for each cost study which clearly defined the proper costs to be included in the cost study. There is no basis to entertain defendant's argument that the allegations of criminal offenses prior to the effective date of *N.J.A.C.* 10:63-3.1 *et seq.* should be dismissed for vagueness. The allegations in the indictment are specific and concise. As indicated, instructions for completing

the studies were mailed to the provider of the services with the study itself. These instructions clearly explained which costs were properly included. Only those costs which represented costs of rendering care to patients in the nursing homes were requested. There is no basis for the defendant to plead ignorance of what was required of her.

Finally, defendant urges that her sentences were harsh and excessive. We have carefully reviewed the record and considered the arguments advanced in support of her contention. We are satisfied the sentences were not excessive. Furthermore, there was no improper exercise of the discretion vested in the sentencing judge. *State v. Whitaker,* 79 *N.J.* 503, 511 (1979). However, in a letter communication subsequent to filing her formal brief, the defendant has brought to our attention the fact that under the Code of Criminal Justice, *N.J.S.A.* 2C:43-1(b), defendant's convictions are treated as fourth degree crimes, namely, misdemeanors, and as such, are limited to a maximum sentence of 18 months. *(N.J.S.A.* 2C:43-6(a)(4)). Defendant's contention appears facially correct. She may make appropriate application for sentence review consistent with the procedure established by order of the Supreme Court dated October 18, 1979. See 104 *N.J.L.J.* 369 (October 25, 1979).

Affirmed.

A TRUE COPY

s/ Elizabeth McLaughlin
Clerk

APPENDIX C — JUDGMENT OF CONVICTION

PASSAIC COUNTY COURT

LAW DIVISION

Page Three Indictment No. 889-76

THE STATE OF NEW JERSEY

v.

RUTH D. HINSON

Defendant

(under) N.J.S.A. 2A:85-14, 30:4D-17 and 2A:85-5
(17th, 19th, 3rd, 7th, 9th, 11th, 16th and 18th cts)

The defendant, being charged on August 17, 1976, Indictment No. 889-76 for the crime(s) of Medicaid Fraud (17th, 19th, 3rd, 7th, 9th, 11th, 16th and 18th cts) N.J.S.A. 2A:85-14, 30:4D-17 and 2A:85-5 and the defendant having pleaded NOT GUILTY and thereafter having on October 11, 1977 BEEN TRIED WITH A JURY AND A VERDICT OF GUILTY TO Medicaid Fraud (17th, 19th, 3rd, 7th, 9th, 11th, 16th and 18th cts) N.J.S.A. 2A:85-14, 30:4D-17 and 2A:85-5 HAVING BEEN RENDERED.

IT IS, THEREFORE, ON Nov. 29, 1977 ORDERED and ADJUDGED that defendant be and is hereby sentenced to: SEVENTEENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. Fine suspended. NINETEENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. Fine suspended. THIRD COUNT: Pay a fine of One Thousand ($1,000.00) dollars. SEVENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. NINTH COUNT: Pay a fine of

Appendix C

One Thousand ($1,000.00) dollars. ELEVENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. SIXTEENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. EIGHTEENTH COUNT: Pay a fine of One Thousand ($1,000.00) dollars. TOTAL FINE Six Thousand ($6,000.00) dollars TOTAL SENTENCE Three (3) to Five (5) years. Sentence stayed pending appeal to Appellate Division Superior Court.

Entered by William L. K Clerk

Judge Joseph N. Donatelli, J.S.C.

November 29, 1977

No. 80-71

Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RUTH D. HINSON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

---

BRIEF IN OPPOSITION

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Questions Presented

1. Did the trial court's decision to bar as irrelevant evidence concerning the responsibilities of petitioner's accountants constitute a violation of the Sixth and Fourteenth Amendments to the United States Constitution? Is this issue cognizable by this Court?

2. Did the mere presence on the empanaled jury of an allegedly biased juror deprive petitioner of an "impartial jury" within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, notwithstanding the trial court's having interviewed the juror, having found no bias, and having removed the juror before deliberations began?[1]

---

[1] Petitioner also raises (Petition at ii) the claim that she was denied the opportunity "to present evidence that she relied upon her accountants. . . ." Inasmuch as petitioner did in fact present such evidence, we do not consider this claim as one presented. See *infra* at 5.

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No. 80-71

Supreme Court of the United States

OCTOBER TERM, 1979

RUTH D. HINSON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Opinions Below

The order of the Supreme Court of New Jersey denying petitioner's petition for certification to the Superior Court of New Jersey, Appellate Division, —— N.J. ——, —— A.2d —— (1980), is appended to petitioner's Petition for Certiorari as Appendix A. The unreported opinion of the Superior Court of New Jersey, Appellate Division, is appended to the Petition as Appendix B. Petitioner's Appendix C is the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

Jurisdiction

Petitioner asserts 28 U.S.C. sec. 1257(3) as the basis for this Court's jurisdiction over her case. We do not agree that this Court has jurisdiction to review petitioner's first two questions. See infra at 7-8.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Sec. 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

N.J.S.A. 30:4D-17(a) and (b), as of the date of this case:

> (a) It shall be unlawful for any person, firm, corporation, partnership, or other entity to willfully, by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or devise on behalf of himself or others, obtain or attempt to obtain medical assistance or other benefits or payments under this act to which he is not entitled, or in a greater amount than to which he is entitled, and, further, it shall be unlawful for any provider to willfully receive medical assistance payments to which he is not entitled, or in a greater amount than to which he is entitled, or to falsify any report or document required under this act.

(b) Any person, firm, corporation, partnership or other legal entity who violates the provisions of subsection (a) of this section shall be guilty of a misdemeanor and shall be liable to a penalty of not more than $10,000.00 for the first and each subsequent offense, or to imprisonment for not more than 3 years, or both.

NEW JERSEY EVIDENCE RULE 4:

The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

Statement of the Case

From 1971 through 1975, petitoner owned two nursing homes in Wayne, New Jersey. During this time, both nursing homes were Medicaid providers, which meant that the expenses incurred by qualifying patients were actually paid by the New Jersey Division of Medical Assistance and Health Services. To obtain these payments, the nursing homes were required annually to submit a cost study, from which the nursing homes' per diem reimbursement rate (cost per patient per day) is calculated. (Petitioner's appendix at 4-5)

In 1971, 1972, and 1973, petitioner signed the cost studies (thus certifying their accuracy) as both owner of the nursing homes and preparer of the studies. In 1974 and 1975, petitioner employed an accounting firm to prepare the cost studies, but petitioner again certified them accurate by signing the cost studies as owner. (Petitioner's appendix at 5).

In fact, the cost studies were wrong. The cost per patient per day was increased by a combination of two factors. On some cost studies, petitioner underrepresented the number of patient days. Moreover, on all cost studies petitioner included improper, personal expenses such as real estate taxes paid on non-business property. (Transcript 10/18/77, 168-171; Petition at 3.)

Petitioner was indicted for 19 violations of N.J.S.A. 30:4D-17. The essence of the charge was the allegation that petitioner willfully misrepresented her expenses and patient days to reach the result described in the previous paragraph. At trial, petitioner did not challenge the accuracy of the prosecution's proofs. Rather, she claimed that she entrusted the original books of record to her accountants, whom she expected to separate allowable expenses from prohibited expenses and submit a proper cost study. (Petitioner's appendix at 2-3, 5)

At trial, petitioner tried to demonstrate both her own reliance upon her accountants' expertise and the accountants' failure to act properly. Although petitioner testified in her own defense about her reliance, she was barred by the trial court from presenting evidence of the accountants' standard of care and professional obligations. The trial court ruled the proffered evidence not relevant to petitioner's guilt. (Petitioner's appendix at 5)

During the trial, defense counsel mentioned what he perceived to be another problem to the trial court. Specifically, he asserted that a juror was violating his oath by discussing the case with an employee of one of petitioner's nursing homes. The court invited defense counsel to learn whatever more he could, but declined to interrogate the jurors or even mention the issue. (Transcript 10/19/77, at 65-69)

The next morning, one of the jurors spoke with the trial judge. The juror explained that he knew a neighbor whose mother worked at one of petitioner's nursing homes. On the first day of trial, the juror had talked to this neighbor long enough to learn of her awareness of the case, after which he had terminated the conversation. (Transcript 10/20/77 at 3-4)

Unbeknown to the juror, defense counsel's investigator later telephoned the neighbor, who related to him the conversation. The neighbor then called the juror's wife, and at this juncture the juror was upset that his neighbors had somehow been involved in a challenge to the juror's own integrity. The juror assured the trial court, however, that the incident had not altered his impartiality. The court then asked the juror not to mention the incident to the other jurors. (Transcript 10/20/77 at 4-11, 22-23)

Despite defense counsel's objections, the trial court did not remove the juror at that time. One week later, however, immediately before summations, the court did remove the juror. (Transcript 10/20/77 at 13-36; Transcript 10/27/77 at 3-6). That same day, the jury convicted petitioner on all counts of the indictment. On November 29, 1977, petitioner was sentenced to pay fines totalling $6,000, and to serve three to five years in jail. (Petitioner's appendix at 9-10)

Summary of Argument

Petitioner's first question presented for review is merely an issue of state, evidential law. Accordingly, it is not a question that this Court can recognize. In any event, the trial court's decision to bar evidence that petitioner's accountants did not exercise the proper standard of care was correct, because the state's proofs showed petitioner's

own guilt, independent of any action or inaction by her accountant.

The second question presented for review does not contain a meritorious claim. Petitioner never demonstrated an actual existence of an opinion in the juror's mind such as would raise a presumption of partiality. Moreover, the trial court thoroughly interrogated the juror, who denied that the incident affected his impartiality. In any event, the juror did not deliberate, so it is apparent that, whatever his feelings, they were not a factor.

ARGUMENT

A. The trial court's decision to bar irrelevant evidence is a question of State law, not now reviewable, and in any event was correct.

In this case, petitioner was accused of "willfully obtain-[ing Medicaid] benefits . . . to which [she was] not entitled," N.J.S.A. 30:4D-17(a), by including improper expenses in her cost studies. Petitioner's defense was that she did not include these expenses to defraud the State of New Jersey, but rather she relied upon her accountants to remove improper expenses. (See generally, petitioner's testimony, transcript 10/26/77). The trial court did not permit petitioner to introduce evidence concerning accountants' standard of care in general, and petitioner now claims constitutional error.

Pursuant to 28 U.S.C. sec. 1257(3), this Court can review any claim asserted under the Constitution of the United States. Questions of evidence law, however, are simply not claims so asserted.

In *Lisenba* v. *California,* 314 U.S. 219 (1941), this Court ruled that it "[does] not sit to review state court action

on questions of the propriety of the trial judge's action in the admission of evidence." 314 U.S. at 228. Moreover, this Court observed that the Constitution leaves the states free to adopt rules of relevance, so long as they are applied in accordance with state law. *Id.* at 227-228.

New Jersey Evid.R. 4 permits trial courts to exclude irrelevant evidence. In this case, petitioner's accountant's standard of care was not relevant to the question of petitioner's own intent when she entered personal expenses in her nursing homes' books of original account. The trial court's decision to exclude the proffered evidence was upheld by the Superior Court of New Jersey, Appellate Division (see petitioner's appendix at 6), and is thus beyond review by this court.

Lastly, we emphasize that the prosecution presented ample evidence tending to show that petitioner intentionally endeavored to disguise personal expenses as nuring home expenses. (See, *e.g.,* transcript 10/13/77 at 53-71). Whatever civil or criminal liabilities petitioner's accountants might have incurred were irrelevant to petitioner's own guilt, and the trial court properly refused to allow petitioner to distract the jury.

B. The trial court ensured impartiality of the jury by interrogating the juror, and in any event by discharging him prior to deliberations.

Petitioner's complaint that possible juror bias was insufficiently investigated is meritless.[2] The trial court exercised its discretion to interrogate the juror and found no bias. It properly permitted the juror to sit after discussing the matter with counsel. *See Arizona* v. *Washington,* 434 U.S. 497 (1978); *Mattox* v. *United States,* 146 U.S. 140 (1892); *United States* v. *Bohr,* 581 F.2d 1294, 1302 (8 Cir. 1978), *cert. den.* 439 U.S. 958 (1978).

In any event, the trial court did not permit the juror to deliberate. Thus, while it was within the court's discretion not to remove the juror in the circumstances of this case, *United States* v. *Bohr, supra,* any damage that could have resulted was obviated by the removal. *United States* v. *Boscia,* 573 F.2d 827, 830-832 (3 Cir. 1978), *cert.* den. 436 U.S. 911 (1978), 439 U.S. 854 (1978); *Jordan* v. *United States,* 408 F.2d 1305 (D.C. Cir. 1969).

---

[2] Petitioner makes two statements at petition, 13, that we are constrained to challenge. Initially she states that "it became known" to defense counsel that a juror knew one of petitioner's employees. It did not. Rather, this claim was merely a defense theory, later abandoned. (Transcript 10/27/77 at 22-25, 32). Additionally, petitioner states that the juror expressed concern "that his withdrawal would adversely effect the petitioner's eventual conviction." This editorial imputation of bias cannot stand. It is clear from the record (Transcript 10/20/77 at 9) that the juror's concern was the continuation of the trial, and not its outcome.

CONCLUSION

Petitioner's claims notwithstanding, her initial question presents no great public issue nor any serious constitutional problem. Rather, her first question is merely one of New Jersey's evidence rules, and this Court accordingly should decline to review the matter. While petitioner's second question may implicate the United States Constitution, it does so in no novel way. We therefore urge this Court to deny the instant petition.

Respectfully submitted,

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